No. 03-13

DEC 16 2003

IN THE

Supreme Court of the United States

THE REPUBLIC OF AUSTRIA, a foreign state, and the AUSTRIAN GALLERY,

Petitioners,

v.

MARIA V. ALTMANN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

E. RANDOL SCHOENBERG
Counsel of Record
DONALD S. BURRIS
BURRIS & SCHOENBERG, LLP
12121 Wilshire Boulevard, Suite 800
Los Angeles, CA 90025
(310) 442-5559

Attorneys for Respondent

184757

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

BEST AVAILABLE COPY

QUESTION PRESENTED

Does the expropriation exception of the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. § 1605(a)(3), afford jurisdiction over claims against foreign states based on conduct that occurred before enactment of the FSIA and before the United States adopted the restrictive theory of sovereign immunity in 1952?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	v
SUMMARY OF ARGUMENT	1
STATEMENT OF THE CASE	1
LEGAL ARGUMENT	9
A. Jurisdiction Under The FSIA In This Case Is Not Impermissibly Retroactive.	9
1. Did Congress Clearly Intend The FSIA To Apply To Cases Concerning Expropriations That Occurred Prior To The Effective Date Of The Act?	15
a. Introduction – Historical Concepts of Jurisdiction Against Foreign Sovereigns in the United States.	15
i. Constitutional and statutory authority for the exercise of jurisdiction over foreign states.	15

Contents

	Page
ii. The common law doctrine of sovereign immunity.	17
iii. The FSIA.	23
b. Congress Intended The FSIA To Apply To All Claims To Immunity, Regardless Of When The Acts Underlying The Case Took Place.	24
2. Does The Expropriation Clause Of The FSIA Have An Impermissibly Retroactive Effect?	30
a. The FSIA Is A Jurisdictional Statute And Therefore Attaches No New Legal Consequences To Prior Events.	30
b. The FSIA provides fair notice to sovereign states of their potential liability for withholding property taken in violation of international law.	32
c. Petitioners did not rely on immunity.	33
d. Petitioners had no settled expectation of immunity.	35

Contents

Page

B. No Foreign Policy Interests Are Actually At Stake In This Litigation. 41

CONCLUSION 45

APPENDIX — Hearing before the Subcommittee on Claims and Governmental Relations, House Judiciary Committee, 93rd Cong. (June 7, 1973) on H.R. 3493. Testimony of Charles N. Brower, Acting Legal Adviser, Department of State and Bruno Ristau, Foreign Litigation Unit, Civil Division, Department of Justice 1a

TABLE OF CITED AUTHORITIES

Page

Cases

Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682 (1976) ..... *passim*

Am. Ins. Ass'n v. Garamendi, __ U.S. __, 156 L. Ed. 2d 376, 2003 U.S. LEXIS 4797 (June 23, 2003) 43, 44

Anderman v. Federal Republic of Austria, 256 F. Supp. 2d 1098 (C.D.Cal. April 15, 2003) 44

Andrus v. Charlestone Stone Products Co., 436 U.S. 604 (1978) 13, 14, 36

Argentine Republic v. Amarada Hess Shipping Corp., 488 U.S. 428 (1989) 16, 17, 19, 23

Banco National de Cuba v. Sabbatino, 376 U.S. 398 (1964) 37, 38

Bank of U.S. v. Planters' Bank of Georgia, 22 U.S. (9 Wheat.) 904 (1824) 21, 22, 39

Berizzi Bros. Co. v. Steamship Pesaro, 271 U.S. 562 (1926) 21

Berizzi Bros. Co. v. The Pesaro, 13 F.2d 468 (2d Cir. 1921) 21, 23

Cited Authorities

Page

Bernstein v. N. V. Nederlandsche-Amerikaansche Stoomvaart-Maat-Schaapj, 210 F.2d 375 (2d Cir. 1954) 7, 38

Bradley v. School Bd. of Richmond, 416 U.S. 696 (1974) 12

Bruner v. United States, 343 U.S. 112 (1952) 36

Burger-Fischer v. DeGussa AG, 65 F. Supp. 2d 248 (D.N.J. 1999) 44

Collission with Foreign Government-Owned Motor Car (Austria) Case, 40 Int'l L. Rep. 73 (Sup. Ct. of Austria 1961) 39

Compania Espanola de Navegacion Maritima, S. A. v. The Navemar, 303 U.S. 68 (1938) 22, 27

Cruz v. United States, 2003 U.S. Dist. LEXIS 10948 (N.D.Cal. 2003) 44

Deutsch v. Turner Corp., 317 F.3d 1005, *rehearing denied and opinion amended* 324 F.3d 692 (9th Cir. 2003) 44

Dole Food Co. v. Patrickson, __ U.S. __, 123 S. Ct. 1655 (2003) 26, 27, 28, 30

Cited Authorities

Page

Dralle v. Republic of Czechoslovakia, 17 Int'l.L.Rep. 155 (Sup. Ct. of Austria 1950) 39

Duveen v. United States Dist. Ct (In re Austrian and German Holocaust Litig.), 250 F.3d 156 (2d Cir. 2001) 44

Eastern Enterprises v. Apfel, 524 U.S. 498 (1998) 10

Ex parte Republic of Peru, 318 U.S. 578 (1943) .. 27

First Nat'l City Bank v. Banco para el Comercio Exterior de Cuba, 462 U.S. 611 (1983) 26, 30, 38

Harper v. Virginia Department of Taxation, 509 U.S. 86 (1993) 10, 37

Hughes Aircraft Co. v. United States ex rel Schumer, 520 U.S. 939 (1997) ..... *passim*

I.N.S. v. St. Cyr, 533 U.S. 289 (2001) .. 9, 10, 14, 15, 29

In re Hussein Lutfi Bey, 256 U.S. 616 (1921) 27

In re Muir, 254 U.S. 522 (1921) 27

International Shoe v. Washington, 326 U.S. 310 (1945) 24

Cited Authorities

	Page
Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424 (D.N.J. 1999)	44
James B. Beam Distilling Co. v. Georgia, 501 U.S. 529 (1991)	10
Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827 (1990)	12
Keene Corp. v. United States, 508 U.S. 200 (1993)	26
Landgraf v. USI Film Products, 511 U.S. 244 (1994)	*passim*
Lindh v. Murphy, 521 U.S. 320 (1997)	10, 14
Martin v. Hadix, 527 U.S. 343 (1999)	9, 10, 14, 26
Mollan v. Torrance, 22 U.S. (9 Wheat.) 537 (1824)	26
National City Bank of New York v. Republic of China, 348 U.S. 356 (1955)	22, 31
Pennoyer v. Neff, 95 U.S. 714 (1878)	24
Republic Nat. Bank of Miami v. United States, 506 U.S. 80 (1992)	9, 14

Cited Authorities

	Page
Republic of Argentina v. Weltover, 504 U.S. 607 (1992)	24
Republic of Mexico v. Hoffman, 324 U.S. 30 (1945)	21, 22
Roberts v. Galen of Virginia, Inc., 525 U.S. 249 (1999)	2
Roeder v. Islamic Republic of Iran, 333 F.3d 228 (D.C.Cir. July 1, 2003)	44
Shaffer v. Heitner, 433 U.S. 186 (1977)	24
Strasberg v. Odyssey Group, Inc., 51 Cal.App.4th 906, 59 Cal.Rtpr.2d 474 (1996)	36
The Gul Djemal, 264 U.S. 90 (1924)	27
The Nereide, 13 U.S. (9 Cranch) 388 (1813)	37
The Paqueta Habana, 175 U.S. 677 (1900)	37
The Santissima Trinidad, 20 U.S. (7 Wheat.) 283 (1822)	*passim*
The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116 (1812)	*passim*

Page

United States v. Alabama, 362 U.S. 602 (1960) 13, 14, 35, 36

United States v. Portrait of Wally, 2002 U.S. Dist . LEXIS 6445 (S.D.N.Y. 2002) 4, 41

United States v. Wilder, 28 F. Cas. 601, 3 Sumn. 308 (1838) 22

Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983) 16, 17, 25, 26, 31

Constitutional Provisions

Article I 17

Article III 15, 16, 26

Fifth Amendment 24

Fifteenth Amendment 35

Statutes

22 U.S.C. § 2370(e)(2) 29

28 U.S.C. § 1330 ..... 16, 24

28 U.S.C. § 1332 16

Page

28 U.S.C. § 1602 ..... 16, 23, 24, 25, 26, 32

28 U.S.C. § 1604 16

28 U.S.C. § 1605 16

28 U.S.C. § 1605(a)(2) 43

28 U.S.C. § 1605(a)(3) ..... *passim*

28 U.S.C. § 1607 16

Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470 16

Act of June 25, 1948, ch. 646, 62 Stat. 930 16

Austrian Federal Law Gazette/BGBl No. 106/1946 .. 4

Austrian Federal Law of December 4, 1998 2

Cal. Code Civ. P. § 338(d) 35, 36

Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 78 15

Military Law 59 5

Rules

Fed. R. Civ. P. 12(b) 8

U.S. Sup. Ct. R. 24.1(a) 2

Page

Other Authorities

"Plunder and Restitution: Findings and Recommendations of the Presidential Advisory Commission on Holocaust Assets in the United States and Staff Report," December 2000 at http://www.pcha.gov/PlunderRestitution.html/html/Home_Contents.html 41

8 Dept. of State Bull. 21 (1943) 6

9 Dept. of State Bull. 310 (1943) 6

14 Dept. of State Bull. 81 (1946) 4

26 Dept. of State Bull. 984 (1952) 22

75 Dept. of State Bull. 649 (1976) 41

Eizenstat, Stuart, In Support of Principles on Nazi-Confiscated Art, December 3, 1998 at http://www.state.gov/www/policy_remarks/1998/981203_eizenstat_heac_art.html 41

H.R. Rep. No. 94-1487 (1976) 23, 25, 26

Knight, Robert, Restitution and Legitimacy in Post-War Austria 1945-1953, Leo Baeck Inst. Yearbook XXXVI, pp. 413-441 (1991) 5

Page

Lauterpacht, Hersch "The Problem of Jurisdictional Immunities of Foreign States," 28 Brit. Y.B. Int'l L. 220, 229 (1951) 21

Multilateral Austrian State Treaty, TIAS 3298; 6 U.S.T. 2369; 1955 U.S.T. Lexis 35 (May 15, 1955) 4, 41

Murray, Michael D., "Jurisdiction Under the Foreign Sovereign Immunities Act for Nazi War Crimes of Plunder and Expropriation," 7 N.Y.U. J. Legis. & Pub.Pol'y __ (forthcoming, Spring 2004) 21

Pub. L. 89-171, 79 Stat. 653 (1964) 29

Pub. L. No. 94-583, § 8, 90 Stat. 2891 (1976) 25

Pub. L. No. 105-158, 112 Stat. 18 (1998) 41

S. Rep. No. 94-1310, pp. 11-12 (1976), U.S. Code Cong. & Admin. News 1976, pp. 6604, 6610 ... 23

Seidl-Hohenveldern, Ignaz 56 American Journal of Int'l L. 509 (1962) 40

Settlement of Certain Claims Under Article 26 of the Austrian State Treaty, TIAS 4253, 10 U.S.T. 1158, 1959 U.S.T. Lexis 253 (1959) 7

U.S. Code Cong. & Admin. News 1976 23

Page

Washington Conference on Holocaust-Era Assets (1988), http://fcit.coedu.usf.edu/holocaust/resource/assets/heac2.pdf 2

Washington Conference on Holocaust-Era Assets, Nazi-Confiscated Art Issues, Statement of Dr. Ernst Bacher, p. 455 at http://fcit.usf.edu/holocaust/resource/assets/heac4.pdf 2

Treatises

Dellapenna, Joseph W., Suing Foreign Governments and their Corporations, pp. 2-3 (2003) 21

Foreign Relations of the United States, 1958-1960, Vol. IX, pp. 769-70 (1993) 7

Manz, William H., Foreign Sovereign Immunities Act of 1976 with Amendments: A Legislative History of Pub. L. No. 94-583 (2000) 28, 29

Restatement of Foreign Relations Law (Third), § 115(1)(a) (1989) 37

SUMMARY OF ARGUMENT

In 1976 Congress enacted the FSIA and announced that henceforth all claims by foreign states to sovereign immunity in United States courts would be governed by that statute. Petitioners' claim to immunity, which was made after this suit commenced in August 2000, should be judged under the FSIA. The FSIA is a jurisdictional statute that does not operate retroactively to control past conduct or have any other impermissibly retroactive effect. It does not determine the substantive rights and remedies of the parties before this Court, but addresses only whether our federal courts have the power to adjudicate them. These conclusions are supported by the language and history of the statute as applied to the particular legal relationship between the parties in this case. As such, the unanimous decision of the Ninth Circuit Panel should be affirmed.

STATEMENT OF THE CASE

This action was brought by Respondent Maria V. Altmann, an 87-year-old American citizen, to recover six paintings by Gustav Klimt confiscated from her uncle by the Nazis during World War II. The paintings subsequently came into the possession of Petitioner Republic of Austria ("Austria"), a foreign state, and are currently housed in the museum operated by Petitioner Austrian Gallery ("the Gallery"), an agency or instrumentality of Austria (Austria and the Gallery are collectively referred to as "Petitioners"). Following her uncle's death in 1945, Petitioners withheld the paintings from Mrs. Altmann, his rightful heir, under false pretenses that have only very recently been revealed to her as a result of an investigation conducted by an Austrian journalist.

Petitioners' recitation of the facts contains numerous errors, several of which Respondent noted in her Brief in Opposition

to the Petition for Writ of Certiorari ("Opp.") at pages 1-4.[1] Because most of these disputed factual issues are not material to the legal issues in this appeal, Mrs. Altmann respectfully refers the Court to the factual summaries set forth in her Complaint and the comprehensive opinions of the District Court and the Ninth Circuit Panel. *See* J. App. C-F, H. In this proceeding, the uncontested allegations in Mrs. Altmann's Complaint should be accepted as true. J. App. 44a.

As much as Mrs. Altmann would like the Court to address and be made fully aware of the substantive merits of her case, this appeal concerns only a threshold procedural question, namely, whether the district court's exercise of jurisdiction is impermissibly retroactive. That question can be decided through a dispassionate analysis of the statute in question, this Court's retroactivity jurisprudence and the legal relationship between the parties to this case.

Mrs. Altmann presumes from the limitation imposed by the Court on the question presented that the Court does not intend to revisit the other issues already determined by the Ninth Circuit Panel.[2] The Ninth Circuit concluded that Mrs. Altmann has satisfied the prerequisites of 28 U.S.C. § 1605(a)(3) by

1. For example, Petitioners continue to assert that Adele Bloch-Bauer bequeathed the paintings to the Gallery, although any reading of her will — whether common sense or according to either Austrian or United States law — shows this claim to be patently false. Opp. at 2 n.1. Further, Petitioners purport to rely on the 1948 "agreement" by Mrs. Altmann's attorney, Dr. Rinesch, when the Austrian Federal Law of December 4, 1998 declares such statements, made in the context of seeking export permits, to be unenforceable. The Chairman of Austria's Provenance Commission, Professor Ernst Bacher, has called the post-war practices leading up to such agreements "indefensible." *See* Washington Conference on Holocaust-Era Assets, Nazi-Confiscated Art Issues, Statement of Dr. Ernst Bacher, p. 455 at http://fcit.usf.edu/holocaust/resource/assets/heac4.pdf.

2. *See* Court Rule 24.1(a); *Roberts v. Galen of Virginia, Inc.*, 525 U.S. 249, 253 (1999).

establishing that her case concerns: (i) rights in property taken in violation of international law, (ii) which property is owned or operated by an agency or instrumentality of a foreign state engaged in a commercial activity in the United States. *See* J. App. C, 57a-61a. The factual support for these conclusions is set forth in great detail in the Ninth Circuit Panel's opinion. Of particular significance for this appeal is the uncontested fact that at the time the suit was brought in the year 2000, the paintings at issue were in the possession of an instrumentality of a foreign state that was engaged in a business activity in the United States, *e.g.* the advertising and selling of tickets for its exhibitions and the selling of catalogue books featuring the paintings at issue.

Mrs. Altmann's claims are not primarily claims for "expropriation" *by Austria*. Rather, Mrs. Altmann seeks the return of property taken in violation of international law from her uncle under the discriminatory laws of Nazi Germany and thereafter wrongfully withheld by Petitioners under false pretenses that have only recently been exposed. The gravamen of her Complaint is a claim for replevin seeking return of her uncle's six paintings or damages. *See* J. App. H, 200a. The paintings themselves came into the possession of the Petitioners at different times and in different ways. Three were obtained by trade or purchase during the Nazi era; the others were obtained by the Gallery only afterwards, in 1948 and 1988. Mrs. Altmann's suit was filed in the year 2000, following press reports revealing that Petitioners had defrauded Mrs. Altmann's family and their attorney after the War. It alleges that Mrs. Altmann has demanded return of the paintings and that Petitioners have refused to return them to her. In short, this lawsuit concerns Petitioners' present refusal to return the paintings, not the prior act of expropriation conducted by the Nazis.

With the factual predicates for the exercise of jurisdiction under the FSIA already established, the only relevant factual issues in this jurisdictional appeal concern Petitioners' purported

"expectations" of immunity from Mrs. Altmann's claims. In that regard, there are several undisputed historical facts:

- **Austria's long-standing treaty obligations require it to return looted artworks.** Austria is a party to the Hague Convention (IV) on the Laws and Customs of War on Land, Oct. 18, 1907, 1 Bevans 631, 1907 U.S.T. LEXIS 29 (entered into force Jan. 26, 1910), Article 56 of which states "*All seizure of . . . works of art . . . is forbidden, and should be made the subject of legal proceedings*." (Emphasis added.) Furthermore, in the 1955 State Treaty for the Re-establishment of an Independent and Democratic Austria ("Austrian State Treaty"), Article 26, paragraph 1, Austria agreed to restitute all unreturned Nazi-looted property.[3] *See* Opp. App. C; *Multilateral Austrian State Treaty*, TIAS 3298, 6 U.S.T. 2369, 1955 U.S.T. Lexis 35 (May 15, 1955).

- **Austria has never been immune in its own territory from Mrs. Altmann's claims.** After the War, Austria was occupied by the United States and the other Big Four allies. On May 10, 1945, less than two weeks after issuing its Proclamation of Independence, Austria declared that the discriminatory practices of the Nazis with regard to property would be reversed. J. App. I 214a. Austria's new government was recognized by the Allies in January 1946. 14 Dept. of State Bull. 81 (1946). Still under the United States and the other Allies' control and influence,[4] in May 1946 Austria passed the so-called *Nichtigkeitsgesetz* (Nullity Law), BGBl No. 106/1946, declaring all transactions that occurred as a result of Nazi persecution "null and void." *See* J. App. I, 214a-215a. Austria was further obligated by the United States to enact a series of laws designed to accomplish restitution of Nazi-looted property.[5] *Id.* The first three of these laws, enacted in July 1946 and February 1947, permitted claims by individuals against the Republic of Austria for the return of confiscated property that fell into government hands. *Id.* In other words, as early as 1946-47, legislation existed in Austria, a foreign state then occupied militarily by the United States and its Allies, that permitted claims against the State for the return of expropriated property — claims just like the ones made here by Mrs. Altmann.[6]

- **Jurisdiction in Austria over Mrs. Altmann's claims has continued to exist until today**. Austria admitted that it still affords an alternative jurisdiction for Mrs. Altmann's claims while arguing in the courts below that the case should be dismissed on *forum non conveniens* grounds. *See* J. App. I, 212a ("Plaintiff has an available forum for her claims in Austria"); J. App. M, 245a-246a (the statute of limitations may be extended beyond thirty years and does not bar Mrs. Altmann's claims). Even Austria recognizes that the jurisdiction afforded under the FSIA is not exclusive, but

3. Indeed, Congress was told that the treaty "provides that Austria will make restoration or provide compensation to victims of nazism, who were largely those of Jewish faith." Statement of John Foster Dulles, Secretary of State, before the United States Senate Committee on Foreign Relations, June 10, 1955, p. 4.

4. *See United States v. Portrait of Wally*, 2002 U.S. Dist Lexis 6445, *27 (S.D.N.Y. 2002) ("Until the signing of the Austrian State Treaty of 1955, the allies would 'sit in judgment' of the Austrian government, in that all official acts required their approval.").

5. In American-controlled areas of Germany, the United States enacted Military Law 59 (approved November 10, 1947), the stated purpose of which was "to effect to the largest extent possible the speedy restitution of identifiable property . . . to persons who were wrongfully deprived of such property within the period from 30 January 1933 to 8 May 1945 for reasons of race, religion, nationality, ideology or political opposition to National Socialism." The United States insisted that similar legislation be adopted by Austria. *See* J. App. I, 214a.

6. The history of Nazi-era expropriations and post-war restitution laws has been recently compiled by the Austrian Historical Commission, whose reports have been published on the website http://www.historikerkommission.gv.at. *See also* Robert Knight, *Restitution and Legitimacy in Post-War Austria 1945-1953*, Leo Baeck Inst. Yearbook XXXVI, pp. 413-441 (1991).

is concurrent with the jurisdiction of the Austrian courts over this matter. Indeed, it was only because of an oppressive filing fee requirement ($2 million) and a more difficult (although, according to Austria, not insurmountable) statute of limitations standard that Mrs. Altmann did not bring her suit in Austria. *See* Declaration of Stefan Gulner, J. App. K, 236a-242a; *see also* J. App. C, 66a-70a; J. App. D, 110a-113a.

- **The United States' public statements during the War provided clear and unambiguous notice that Nazi-looted property would have to be returned after the War.** In January 1943, the United States and seventeen of its allies issued the Declaration Regarding Forced Transfers of Property in Enemy-Controlled Territory (the "London Declaration), warning "that they intend to do their utmost to defeat the methods of dispossession practiced by the governments with which they are at war against the countries and peoples who have been so wantonly assaulted and despoiled." 8 Dept. of State Bull. 21-22 (1943); Pet. App. C, 13a. Later that year, in the so-called "Moscow Declaration" of November 1, 1943, Austria was declared the first "victim" of Hitlerite aggression, but at the same time "reminded, however that she has a responsibility which she cannot evade for participation in the war on the side of Hitlerite Germany. . . ." 9 Dept. of State Bull. 310 (1943).

- **The initial United States' pronouncements just after the end of the War confirmed that individual claims for the return of Nazi-looted property could be made in the United States.** In 1949, the State Department issued a press release along with a letter submitted by Acting Legal Adviser to the State Department Jack B. Tate announcing that

  > it is this Government's policy to undo the forced transfers and restitute identifiable property to the victims of Nazi persecution wrongfully deprived of

  > such property; and . . . *the policy of the Executive, with respect to claims asserted in the United States for restitution of such property, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.*

  Press Release No. 296, "Jurisdiction of United States Courts Re Suits for Identifiable Property Involved in Nazi Forced Transfers," reprinted in *Bernstein v. N. V. Nederlandsche-Amerikaansche Stoomvaart-Maat-Schaapj*, 210 F.2d 375, 375-76 (2d Cir. 1954) (per curiam) (emphasis added).

- **The United States specifically informed the Austrian government that individual claims could be made for Nazi-looted property.** As stated above, Article 26 of the 1955 Austrian State Treaty confirmed Austria's obligation to restitute Nazi-looted property. In discussions thereafter, the United States confirmed to Austrian authorities that "the Government could not prevent private persons from advancing claims or arguing with the Austrian Government." Memorandum of Conversation between Secretary of State John Foster Dulles and Chancellor Julius Raab, May 19, 1958, reprinted in *Foreign Relations of the United States, 1958-1960*, Vol. IX, pp. 769-70 (1993). Claims for looted artworks have never subsequently been discussed or resolved diplomatically. *See* Settlement of Certain Claims Under Article 26 of the Austrian State Treaty, TIAS 4253, 10 U.S.T. 1158, 1959 U.S.T. Lexis 253 (1959) (leaving unknown claims and looted art claims unsettled).

- **The more recent January 17, 2001 executive agreement with Austria preserves individual claims for the return of artworks.** The recent executive agreement concluded between the United States and Austria — the January 17, 2001 Joint Statement and Exchange of Notes concerning the establishment of the General Settlement Fund — expressly and conspicuously excludes and preserves

> individual claims for Nazi-looted artworks. *See* Opp. App. A, 2a-3a. Indeed, Mrs. Altmann's counsel participated at the invitation of the State Department in the negotiation of the executive agreement, and in connection therewith obtained a letter from Austria specifically affirming to the State Department that the executive agreement would not "affect or pertain to" Mrs. Altmann's case which was then pending.[7] *See* J. App. L, 243a — January 17, 2001 Letter from Hans Winkler, Legal Adviser, Austrian Federal Ministry for Foreign Affairs, to Stuart E. Eizenstat, Deputy Secretary of the Treasury.

It is against this historical backdrop, and clear reiteration of American policy to encourage the return of looted artworks, that the present appeal concerning the allegedly impermissible retroactivity of the FSIA in this case must be judged. As demonstrated below, this Court's retroactivity jurisprudence teaches that the exercise of jurisdiction in this case would simply provide a jurisdictional basis for implementing American policy, would not operate retroactively and would not have any impermissibly retroactive effects on the rights or remedies of the parties.

---

7. Initially, Petitioners nevertheless attempted to assert an "act of state" defense based on the executive agreement in their motion to dismiss before the district court below. After objections were raised by the State Department, Petitioners expressly withdrew the argument that Plaintiff's claims were barred by the act of state doctrine and filed a statement confirming that

> (1) Plaintiff's claims in this action are not subject to the provisions of the Joint Statement and Exchange of Notes, including those provisions regarding legal closure; (2) This action shall not affect the establishment and funding of the General Settlement Fund as provided for in the Joint Statement and Annex A to the Exchange of Notes.

Supplemental Memorandum Re: Motion to Dismiss Under Fed. R. Civ. P. 12(b) filed February 21, 2001.

LEGAL ARGUMENT

A. Jurisdiction Under The FSIA In This Case Is Not Impermissibly Retroactive.

Petitioners and their *amici curiae* address nearly all of their argument to the hypothetical question of whether foreign countries would have been immune from suit in the United States in a case concerning expropriated property decades prior to the enactment of the FSIA. In Mrs. Altmann's view, this narrow approach misses the point. Indeed, the Court's recent retroactivity jurisprudence dictates a completely different analysis.

The principal question raised by the Petitioners is whether the application of § 1605(a)(3) of the FSIA in a case concerning events which occurred before its effective date is impermissibly retroactive. This Court has set forth a two-part test to answer this question: (1) whether Congress has directed with the requisite clarity that the law be applied retrospectively; and (2) whether application of the new statute produces an impermissible retroactive effect. *I.N.S. v. St. Cyr*, 533 U.S. 289, 316-20 (2001); *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994).

"A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based in prior law." *Landgraf* at 269, citing *Republic Nat. Bank of Miami v. United States*, 506 U.S. 80, 100 (1992) (Thomas, J., concurring in part and concurring in judgment). Instead, "[t]he inquiry into whether a statute operates retroactively demands a common sense, functional judgment about 'whether the new provision attaches new legal consequences to events completed before its enactment.' This judgment should be informed by 'familiar considerations of fair notice, reasonable reliance, and settled expectations.'" *Martin v. Hadix*, 527 U.S. 343, 357-58 (1999) (quoting *Landgraf* at 270).

This Court has extensively addressed the retroactivity of civil statutes in at least five cases in the past decade. *St. Cyr*; *Martin*; *Lindh v. Murphy*, 521 U.S. 320 (1997); *Hughes Aircraft Co. v. United States ex rel Schumer*, 520 U.S. 939 (1997); and *Landgraf*.[8] All of these cases concerned whether to apply a modification of a pre-existing statute.

In this case, by contrast, the Court will address the purportedly impermissible retroactivity of a statute that replaced a federal common law doctrine rather than an earlier statute. This is an important distinction, because the Court's understanding and pronouncement of the common law evolves over time, and statements of federal common law by this Court are traditionally given retroactive effect. *Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993). In *Harper* the Court explained:

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review as to all events, regardless of whether such events predate or postdate our announcement of the rule.

Id., 509 U.S. at 97-98; *see also James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 539 (1991) (opinion of Souter, J.) (a rule of federal law "is properly understood to have followed the normal rule of retroactive application" and must be "read to hold . . . that its rule should apply retroactively to the litigants then before the Court."). In deciding whether a new statute that replaces a common law doctrine is impermissibly retroactive, the new statute should be compared to the common law doctrine

8. *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998) also discussed retroactivity principles but was not decided principally on that ground. *Eastern Enterprises* concerned a statute that replaced an industry-wide labor agreement. The case was decided as a takings and due process case, in which the general principles against retroactivity were cited as an analogy.

it replaced. By focusing on the state of the common law of sovereign immunity in 1938 or 1945 or 1952, as opposed to in 1976 or today, Petitioners set up a straw man that has no relevance to the question presented in this appeal.

The inquiry is further complicated by the fact that the common law rule in question concerns a defense to the exercise of jurisdiction. As this Court has stated on several occasions, a statute that merely confers or ousts jurisdiction does not normally raise any retroactivity concerns. *Landgraf*, at 274-5. As this court explained:

> We have regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed. . . . [I]n *Andrus v. Charlestone Stone Products Co.*, 436 U.S. 604, 607-608 n. 6 (1978), we held that, because a statute passed while the case was pending on appeal had eliminated the amount-in-controversy requirement for federal-question cases, the fact that respondent had failed to allege $10,000 in controversy at the commencement of the action was "now of no moment." *See also United States v. Alabama*, 362 U.S. 602, 604 (1960) (per curiam); *Stephens v. Cherokee Nation*, 174 U.S. 445, 478 (1899). Application of a new jurisdictional rule usually "takes away no substantive right but simply changes the tribunal that is to hear the case." *Hallowell [v. Commons]*, 239 U.S. [506] at 508 [(1916)]. Present law normally governs in such situations because jurisdictional statutes "speak to the power of the court rather than to the rights or obligations of the parties." *Republic Nat. Bank of Miami*, 506 U.S. at 100 (Thomas, J., concurring).

Landgraf at 274; *see also Landgraf* at 293 (Scalia, J., concurring) ("Our jurisdiction cases are explained, I think, by the fact that

the purpose of the provisions conferring or eliminating jurisdiction is to permit or forbid the exercise of judicial power — so that the relevant event for retroactivity purposes is the moment at which the power is sought to be exercised."); *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 857 (1990) (Scalia, J., concurring) ("Whether a particular application *is* retroactive" will "depend upon what one considers to be the determinative event by which retroactivity or prospectivity is to be calculated."); *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 713 n.17 (1974) (identifying prior cases in which new statutes were applied to pending cases).

The *Landgraf* case concerned the application to a case on appeal of a 1991 amendment to Title VII of the Civil Rights Act of 1964, which created the right to a jury trial to recover compensatory and punitive damages for intentional discrimination. The Court found that the statute did not clearly state whether it should be applied retroactively. *Landgraf* at 250-263. The Court then went on to the next step of the analysis and held that to apply the new rule to cases arising prior to the enactment would be akin to "creating a new cause of action." *Id.* at 283. By dramatically increasing the amount of damages available, the statute would impose on employers a "new disability" in respect to past events. *Id.* The Court found this to be impermissibly retroactive, and, barring a clear expression of statutory intent found within the statute, would not apply the new rule to cases arising prior to the enactment.

The application of the *Landgraf* holding to jurisdictional statutes was further clarified by this Court in a unanimous decision in *Hughes*. In that case, a statute phrased in jurisdictional terms altered the substantive law of the case by eliminating a defense to the relator's *qui tam* suit on the grounds that the government was aware of the information that formed the basis of the suit. By eliminating an essential element of the *qui tam* case the new statute altered the relationship between the parties. *Id.* at 948. The Court would not permit such a statute to operate retroactively to permit claims for relief that could

not have been asserted by the relator prior to the enactment of the new statute. Because the change in the statute affected the substance, indeed the very existence, of the claims, and not just the power of the court to hear the case, the statute could not be applied retroactively. The Court therefore distinguished the statute at issue in *Hughes* with other statutes conferring or ousting jurisdiction. The latter were still presumed to be applicable to all claims, even those arising prior to the enactment, because, unlike in *Hughes*, these statutes did not affect the substantive rights or liabilities of the parties but only the power of the court to hear the case. As the Court put it:

> Statutes merely addressing *which* court shall have jurisdiction to entertain a particular cause of action can fairly be said merely to regulate the secondary conduct of litigation and not the underlying primary conduct of the parties. Such statutes affect only *where* a suit may be brought, not *whether* it may be brought at all. The 1986 amendment, however, does not merely allocate jurisdiction among fora. Rather, it *creates* jurisdiction where none previously existed; it thus speaks not just to the power of the particular court but to the substantive rights of the parties as well. Such a statute, even though phrased in "jurisdictional" terms, is as much subject to our presumption against retroactivity as any other.

Hughes, 520 U.S. at 951 (emphasis in original) (citations omitted).

After *Landgraf* and *Hughes*, the question for jurisdictionally-phrased statutes is whether they modify the underlying rights and remedies of the parties, or merely "allocate jurisdiction." Examples of the latter include *Alabama*, a case in which the Court held that the new Civil Rights Act of 1960 should be applied in a pending case against a State that had previously been immune from such suits, and *Andrus*, where the Court applied the new federal-question statute that eliminated

the amount in controversy requirement for suits against the United States. *Landraf,* 511 U.S. at 274; *Republic*, 506 U.S. at 10[illegible] (Thomas, J., concurring); *Andrus*, 436 U.S. at 608; *Alabama*, 362 U.S. at 604. In both *Alabama* and *Andrus*, as the Court pointed out, the new statute eliminated a jurisdictional defense to the litigation previously available to a sovereign state, but that did not alter the pre-existing rights of the parties, which existed regardless of the forum in which those rights were litigated.

The remaining retroactivity cases, *Lindh*, *Martin* and *St. Cyr*, turned principally on the question of whether the statute was intended to be applied retroactively. In *Lindh*, a sharply divided Court considered a modification of the federal habeas statute. The majority, in an opinion by Justice Souter, found that by negative implication arising from a comparison to a neighboring provision, the new statute was intended by Congress to apply only to cases filed after the act became effective. *Id.* at 336. The dissent, authored by Chief Justice Rehnquist, found the statute to be "entirely procedural" and "jurisdictional" and therefore presumptively retroactive. *Id.* at 342-44.

In *Martin,* the Court considered the retroactive application of an attorneys' fees provision in the Prison Litigation Reform Act of 1995. The Court found that there was no clear expression of intent by Congress regarding the retroactive application of the statute, and the majority held that to apply the new limitation on fees to work completed before the enactment would unsettle the expectation of the parties. However, the new Act should and would be applied to all work completed after the effective date of the Act. *Id.* at 360-362.

Finally, in *St. Cyr*, a newly-enacted statute which eliminated any discretion to refrain from deporting an immigrant convicted of a felony was held by a sharply divided Court to be inapplicable to a person who pled guilty in reliance on the old statute. The majority, led by Justice Stevens, found no clear expression

of a legislative intention to apply the statute retroactively. *Id.* at 314-320. The dissent, authored by Justice Scalia, would have found that the new statute was unambiguous in its scope and that it expressly applied to all deportation proceedings.

These recent decisions provide the proper framework for the Court's consideration of the retroactivity question at issue in this case. Viewed from the proper perspective, they support Respondent's position in this case.

1. Did Congress Clearly Intend The FSIA To Apply To Cases Concerning Expropriations That Occurred Prior To The Effective Date Of The Act?

a. Introduction – Historical Concepts of Jurisdiction Against Foreign Sovereigns in the United States.

i. Constitutional and statutory authority for the exercise of jurisdiction over foreign states.

Federal jurisdiction over claims by United States citizens against foreign states was first authorized in Article III, Section 2 of the United States Constitution, which provided in pertinent part that:

> The judicial Power shall extend . . . to Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

The jurisdiction granted to federal courts in the Judiciary Act of 1789 did not follow the quoted language of the Constitution, and the Act did not expressly provide for jurisdiction in actions against foreign states. *See* Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 78. However, perhaps because most suits against foreign states were brought under the federal court's admiralty, rather than diversity, jurisdiction, this lack of express statutory authority appears not to have been squarely addressed for many years.

In 1875, Congress enacted a new diversity statute that tracked the language of the Constitution and expressly provided for jurisdiction over "a controversy between citizens of a State and foreign states, citizens or subjects." Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470. In 1948, the same language was adopted in 28 U.S.C. § 1332. *See* Act of June 25, 1948, ch. 646, 62 Stat. 930.

In 1976, Congress enacted the FSIA and shifted the grant of federal court jurisdiction for suits against foreign states from § 1332 to § 1330, where it remains today. Under § 1330, the district court is recognized as having:

> original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim to relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

Thus, pursuant to the authority granted in Article III, Section 2 of the Constitution, § 1330 expressly provides federal court jurisdiction for suits against foreign states. Such jurisdiction is, of course, limited by the statutory doctrine of sovereign immunity, as set forth in 28 U.S.C. § 1602, *et seq*. Section 1604 states that "a foreign state shall be immune from the jurisdiction of the United States and of the States except as provided in sections 1605 to 1607 of this chapter." 28 U.S.C. § 1604. These exceptions to sovereign immunity set forth in §§ 1605 to 1607 "[provide] the sole basis for obtaining jurisdiction over a foreign state in the courts of this country." *Argentine Republic v. Amarada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488 (1983) (FSIA contains "comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities").

The second prong of § 1605(a)(3), the exception to sovereign immunity that Mrs. Altmann relied on and the Ninth Circuit Panel applied in this case, provides:

> A foreign state shall not be immune from the jurisdiction of courts of the United States . . . in any case .. . . in which rights in property taken in violation of international law[9] are in issue and . . . that property . . . is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.

This Court has not indicated that it will review the Ninth Circuit's decision that Mrs. Altmann has satisfied the requirements of this exception, and Respondent will not further discuss it.

ii. The common law doctrine of sovereign immunity.

The FSIA codified for the first time the principles of sovereign immunity to be applied in actions in United States courts. Prior to the enactment of the FSIA, courts applied, as "a matter of grace and comity on the part of the United States," a common law doctrine of sovereign immunity as a *defense* to the exercise of jurisdiction in actions against foreign states. *Verlinden*, 461 U.S. at 486. This common law principle of sovereign immunity was famously set forth by Chief Justice Marshall in *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812), a case concerning a claim to immunity made by the Republic of France against a libel to an expropriated warship that was forced by weather to enter the port of Philadelphia.

In *The Schooner Exchange*, Chief Justice Marshall confirmed at the outset that the sovereignty of the United States

9. As the Court noted in *Amarada Hess*, Congress rested the FSIA in part on its power under Art. I, sec. 8, cl. 10 of the Constitution "[t]o define and punish . . . Offenses against the Law of Nations." *Amarada Hess*, 488 U.S. at 436.

included the "full and absolute" power to adjudicate claims against foreign states made within the territorial jurisdiction of this country. *Id.* at 137. The Chief Justice noted:

> The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. . . . All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.

Id. at 136. Chief Justice Marshall's opinion held, however, that under the then-prevailing practice of nations, foreign states should be supposed to enter the jurisdiction of the United States only under an implied license affording immunity from claims concerning their public property, *e.g.* warships.

This implied license could be revoked upon fair notice, for example, by passing legislation expressly authorizing jurisdiction over foreign states. Absent such express legislation, Chief Justice Marshall would not recognize a rescission of the implied waiver of jurisdiction in any suit against a foreign state:

> Without doubt, the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction either by employing force, or by subjecting such vessels to the ordinary tribunals. But until such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction, which it would be a breach of faith to exercise. Those general statutory provisions therefore which are descriptive of the ordinary jurisdiction of the judicial tribunals, which give an individual whose property has been wrested from him, a right to claim that property in the courts of the country, in which it is found, ought not, in the opinion of this Court, to be so construed as to give

> them jurisdiction in a case, in which the sovereign power has impliedly consented to waive its jurisdiction.

Id. at 146.

That the United States could revoke the "implied" license of sovereign immunity was confirmed by Justice Story, writing for the Marshall Court in *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283 (1822), a case concerning a claim for restitution of goods on a seized warship that had docked in Norfolk, Virginia. As described by Justice Story:

> But as such consent and license is implied only from the general usage of nations, it may be withdrawn upon notice at any time, without just offence, and if afterwards such public ships come into our ports, they are amenable to our laws in the same manner as other vessels. To be sure, a foreign sovereign cannot be compelled to appear in our Courts, or be made liable to their judgment, so long as he remains in his own dominions, for the sovereignty of each is bounded by territorial limits. If, however, he comes personally within our limits, although he generally enjoy a personal immunity, he may become liable to judicial process in the same way, and under the same circumstances, as the public ships of the nation.

Id. at 353.

Notably, in *The Santissima Trinidad*, Justice Story refused to extend the principle of implied sovereign immunity to bar a suit for restitution of goods on a seized warship, finding that such goods were not subject to the implied waiver of jurisdiction under the doctrine of sovereign immunity. *See Amarada Hess*, 488 U.S. at 437. Instead, Justice Story again confirmed the absolute right of the United States to exercise its complete jurisdiction in the following terms:

> It may therefore be justly laid down as a general proposition, that all persons and property within the

territorial jurisdiction of a sovereign, are amendable to the jurisdiction of himself or his Courts: and that the exceptions to this rule are such only as by common usage, and public policy, have been allowed, in order to preserve the peace and harmony of nations, and to regulate their intercourse in a manner best suited to their dignity and rights. It would indeed be strange, if a license implied by law from the general practice of nations, for the purposes of peace, should be construed as a license to do wrong to the nation itself, and justify the breach of all those obligations which good faith and friendship, by the same implication, impose upon those who seek an asylum in our ports. We are of the opinion that the objection cannot be sustained; and that whatever may be the exemption of the public ship herself, and of her armaments and munitions of war, the prize property which she brings into our ports is liable to the jurisdiction of our Courts, for the purpose of examination and inquiry, and if proper case be made out, for restitution to those whose possession has been devested by a violation of our neutrality; and if the goods are landed from the public ship in our ports, by the express permission of our own government, that does not vary the case, since it involves no pledge that if illegally captured they shall be exempted from the ordinary operation of our laws.

Id. at 353-54.

Notwithstanding Justice Story's opinion, *The Santissima Trinidad* was virtually ignored, and *The Schooner Exchange* was for many years mistakenly cited for the proposition that foreign states were "absolutely" immune from suit in United

States courts.[10] However, it now appears to be universally accepted that the opinions of the Marshall Court reveal an approach quite consistent with the modern understanding of the sovereign immunity doctrine.[11] Thus, the holding of *The Schooner Exchange* should probably never have been extended to claims against foreign states based on non-public activities, *i.e.* commercial or expropriation claims not involving purely governmental activities. Indeed, Chief Justice Marshall had written, "A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince, and assuming the character of a private individual." *The Schooner Exchange* at 143; *see also Bank of U.S. v. Planters' Bank of Georgia*, 22 U.S. (9 Wheat.) 904 (1824) (Marshall, C.J.). In *Planters' Bank of Georgia*, the Chief Justice had written:

> It is, we think, a sound principle that when a government becomes a partner in any trading

10. *See, e.g., Berizzi Bros. Co. v. Steamship Pesaro*, 271 U.S. 562 (1926) (applying the "absolute" doctrine of sovereign immunity notwithstanding a circuit judge's opinion and the advice of the State Department supporting a more restrictive view that would have permitted claims against a commercial ship owned by Italy). *Cf. Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 702 (1976) (*Pesaro* "no longer correctly states the law"); *Republic of Mexico v. Hoffman*, 324 U.S. 30, 38 (1945) (Frankfurter, J., concurring) (criticizing holding in *Pesaro*); *Berizzi Bros. Co. v. The Pesaro*, 13 F.2d 468 (2d Cir. 1921) (Mack, J.) (setting forth case for restrictive theory of sovereign immunity).

11. *See* Michael D. Murray, "Jurisdiction Under the Foreign Sovereign Immunities Act for Nazi War Crimes of Plunder and Expropriation," 7 N.Y.U. J. Legis. & Pub. Pol'y __ (forthcoming, Spring 2004), text available at http://papers.ssrn.com/sol3/delivery.cfm/SSRN_ID451221_code030929570.pdf?abstractid=451221, Joseph W. Dellapenna, *Suing Foreign Governments and their Corporations*, pp. 2-3 (2003); Hersch Lauterpacht, "The Problem of Jurisdictional Immunities of Foreign States," 28 Brit. Y.B. Int'l L. 220, 229 (1951).

> company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted.

Id., 22 U.S. at 907. Justice Story was also very much in accord with this "restrictive" view. *The Santissima Trinidad*, *supra*; *United States v. Wilder*, 28 F. Cas. 601, 3 Sumn. 308, 315-317 (1838) (Story, J.) (government-owned merchant ship not entitled to same privileges and immunity as ship of war).

Nevertheless, it took almost 125 years for the Court to return to the restrictive theory of sovereign immunity suggested by the Marshall Court. *See Compania Espanola de Navigacion Maritima v. The Navemar*, 303 U.S. 68 (1938) (affirming jurisdiction over foreign state's claim to merchant ship); *Republic of Mexico v. Hoffman*, 324 U.S. 30 (1945) (permitting claim against Mexican commercial ship absent State Department suggestion of immunity); *National City Bank of New York v. Republic of China*, 348 U.S. 356 (1955) (permitting counterclaims against China). This return coincided with the announcement by the State Department in the so-called Tate Letter of 1952 that the United States had adopted the "restrictive theory" of sovereign immunity to permit suits against foreign sovereigns for certain actions. Letter from Jack B. Tate, Acting Legal Advisor, Department of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), reprinted in 26 Dept. of State Bull. 984-85 (1952), and in *Alfred Dunhill*, 425 U.S. at 711 (Appendix 2 to opinion of White, J.). As has been demonstrated, the "history" presented in the Tate Letter of the "newer or restrictive theory of sovereign immunity" is largely inaccurate. It fails to recognize that the theory was not new at all, but rather conformed to the initial views of the Marshall Court (and, indeed, the views of the State Department as

expressed thirty years earlier in *The Pesaro*[12]). Rather than marking the beginning of a "new" approach to sovereign immunity, the Tate Letter in reality simply reflected a return to the original conception of that doctrine.

iii. The FSIA.

The FSIA codified what until 1976 had been a common law doctrine. The impetus for the legislation was a concern that because courts tended to follow recommendations of the State Department, sovereign immunity determinations were subject to political influences. The drafters of the FSIA (the State and Justice Departments) intended to

> insure that this restrictive principle of immunity is applied in litigation before U.S. courts. . . . A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process.

H.R. Rep. No. 94-1487 at 7; 1976 U.S.C.C.A.N. at 6605 (1976).

The FSIA "sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity raised by sovereign states before Federal and State courts in the United States," and "prescribes . . . the jurisdiction of U.S. district courts in cases involving foreign states." *Amarada Hess*, 488 U.S. at 435 n.3, quoting S. Rep. No. 94-1310, pp. 11-12 (1976), U.S. Code Cong. & Admin. News 1976, pp. 6604, 6610.

The stated purpose of the FSIA concerns the adjudication of "claims of foreign states to immunity" (a term used twice in section 1602).

> The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the

12. *See Berizzi*, 13 F.2d at 479-80.

> rights of both foreign states and litigants in United States courts. . . . Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles of this chapter.

28 U.S.C. § 1602.

Each of the exceptions to sovereign immunity set forth in § 1605 required some jurisdictional contact with the United States. For example, the expropriation clause (§ 1605(a)(3)) required that the property at issue (or property exchanged with it) be present in the United States or owned or operated by an agency or instrumentality engaged in a commercial activity in the United States. As a result, the FSIA mandated that when subject matter jurisdiction existed under one of the exceptions to immunity, personal jurisdiction would also exist.[13] 28 U.S.C. § 1330.

b. Congress Intended The FSIA To Apply To All Claims To Immunity, Regardless Of When The Acts Underlying The Case Took Place.

The first question that must be addressed under this Court's retroactivity jurisprudence is whether Congress has directed with

13. In this regard, the FSIA appears to adopt the "minimum contacts" approach to jurisdiction, as in *International Shoe v. Washington*, 326 U.S. 310 (1945) and *Shaffer v. Heitner*, 433 U.S. 186 (1977), rather than the more territorial approach that prevailed in the 19th Century, as set forth in *Pennoyer v. Neff*, 95 U.S. 714 (1878). The second prong of § 1605(a)(3) arguably extends beyond the reach of the minimum contacts test, but this is of no moment in this case because the Ninth Circuit Panel found that the minimum contacts approach had been satisfied. J. App. C, 61a-64a. Neither that issue, nor the related issue of whether a foreign state is entitled to due process under the Fifth Amendment, is at issue in this appeal. *See Republic of Argentina v. Weltover*, 504 U.S. 607, 619 (1992). In any case, suits such as this one between citizens of the United States and foreign states are expressly authorized in the Constitution. Thus, the territoriality question should raise no constitutional issues with regard to subject matter jurisdiction.

the requisite clarity that the FSIA be applied, as here, to cases that concern acts that predate the effective date of the statute. The Ninth Circuit did not decide this question and none of the other circuit courts that have addressed the issue has focused properly on the pertinent language of the statute or the particular provisions of the expropriation clause at issue in this case. The key is that because the FSIA concerns *claims to immunity*, and not the underlying claim for relief, Congress must certainly have intended the statute to apply to all pending cases regardless of when the underlying acts took place.

The FSIA announced new procedures for determining claims of foreign states to immunity. *Verlinden*, 461 U.S. at 488. This announcement is precisely what is required under *The Schooner Exchange* and *The Santissima Trinidad* to alert foreign sovereigns that if, by their conduct, they enter the jurisdiction of United States courts, their claims to immunity will be handled according to the new law. The FSIA specifically put foreign nations on notice that their "claims to immunity" would "henceforth" be adjudicated by United States courts under the rules and procedures set forth in the act. 28 U.S.C. § 1602. There was no ambiguity in this notice because it was directed to *claims to immunity made after the effective date of the Act*, without regard to the date of the underlying conduct.

With regard to the expropriation clause set forth in § 1605(a)(3), foreign states were warned that if they brought expropriated property to the United States or entrusted it to an agency or instrumentality engaged in a commercial activity in the United States, their claims to immunity would no longer be accepted.[14] The argument of Petitioners and their *amici curiae*

14. The 90-day delay between enactment and the effective date of the Act should also be seen in this light, to provide foreign states with sufficient time to sever jurisdictional contacts with the United States if they did not want to be subject to suits under the FSIA. H.R. Rep. No. 94-1487, at 33. *See* Pub. L. No. 94-583, § 8, 90 Stat. 2891, 2898 (1976) (Congress delayed FSIA's effective date "to give adequate notice of the act and its detailed provisions to all foreign states").

— that the word "henceforth" in § 1602 indicates that the statute was meant to apply only to claims for relief arising after the effective date of the Act — ignores the fact that § 1602 speaks only to "claims to immunity" and not to claims for relief. The FSIA focuses on the manner of adjudicating the claim to immunity, not the underlying claim.

The contention that the law of sovereign immunity is "substantive," as this Court stated in a completely different context in *Verlinden*,[15] does not answer the retroactivity question. Regardless of whether one considers the law of sovereign immunity in the FSIA to be "substantive" or "procedural," it is clear that the expropriation clause of the FSIA does *not* "operate retroactively." *Martin*, 527 U.S. at 359 ("When determining whether a new statute operates retroactively, it is not enough to attach a label (e.g. 'procedural.' 'collateral') to the statute; we must ask whether the statute operates retroactively.") Section 1605(a)(3) does not affect or pertain to liability or the substance of the underlying claim, but regulates only the sovereign immunity claim that may be raised in defense to the litigation in this forum. *See First Nat. City Bank v. Banco para el Comercio Exterior de Cuba*, 462 U.S. 611, 620-21 (1983); H.R. Rep. No. 94-1487 at 12, 1976 U.S.C.C.A.N. 6604, at 6610 ("The bill is not intended to affect the substantive law of liability.").

A claim to sovereign immunity arises only after a complaint is filed, and it must be judged based on the status of the defendant and the law of the forum at the time of the complaint. *Dole Food Co. v. Patrickson*, __ U.S. __, 123 S. Ct. 1655, 1662 (2003); *Keene Corp. v. United States*, 508 U.S. 200, 207 (1993); *Mollan v. Torrance*, 22 U.S. (9 Wheat.) 537, 539 (1824).

15. *Verlinden* concerned whether the FSIA was constitutional when it permitted suits by foreign citizens against foreign states, since such suits were not authorized under the Diversity Clause of Article III. The Court held that Congress had authority to establish such jurisdiction pursuant to the "Arising Under" clause, because the law of sovereign immunity was "substantive" law of the United States. *Verlinden*, 461 U.S. 480.

See also In re Muir, 254 U.S. 522 (1921) (Court considered British requisition of ship for use as admiralty transport at time of suit); *In re Hussein Lutfi Bey*, 256 U.S. 616 (1921) (Court considered status of Turkish ship in light of breakoff in relations between United States and Ottoman Turkey at time of suit); *The Gul Djemal*, 264 U.S. 90 (1924) (same); *The Navemar*, 303 U.S. at 73-74 (Court considered status of ship requisitioned by Spanish government at time of suit); *Ex parte Republic of Peru*, 318 U.S. 578, 588 (1943) (Court considered the good relations between Peru and the United States at time of suit).

Petitioners and their *amici curiae* studiously ignore this Court's recent holding in *Dole Food* because it is fatal to their argument. In *Dole Food*, the Court found that a privatized company could not claim sovereign immunity protection even though it would have qualified for such protection at the time the cause of action accrued. This Court rejected the contention that the FSIA regulates the conduct of the foreign sovereign, finding that the comparison to other status-based immunities was "inapt". *Id.* at 1663. According to *Dole Food*, the FSIA is directed to the exercise of jurisdiction over the defendant, which is based on the defendant's status at the time of suit. *Id.*

Dole Food controls the result in this case. The present tense has "real significance" in statutory construction. *Id.* at 1662. Section 1605(a)(3) purposely uses the present tense. It directs that, at the time of suit, the property at issue must be either present in the United States, or owned or operated by an agency or instrumentality that is engaged in a commercial activity in the United States. The statute speaks to the *current status* of the defendant and whether it is *currently* entitled to sovereign immunity in this forum. The FSIA does not look backward.

Therefore, consistent with this Court's opinion in *Dole Food*, the FSIA does not "operate retroactively" on the underlying claims, but concerns only the "claim to immunity" in this forum which arises when the complaint is filed. Similarly, the focus in the two expropriation cases of *The Schooner*

Exchange and *The Santissima Trinidad* was not the expropriation itself, which was contended to be in violation of international law, but the claim for sovereign immunity that arose (under a theory of implied waiver) when the ships entered United States ports. The activity regulated by the expropriation clause of the FSIA is the assertion of the court's jurisdiction in the present, not the underlying expropriation in the past.

A contrary reading would lead to untenable results. It would require overruling *Dole Food* because, under Petitioners' theory, the FSIA would be directed to the activity underlying the suit and immunity should be judged based on the facts that existed at that time. Indeed, if the Court followed Petitioners' argument, the United States would always be a safe haven for expropriated property in the United States so long as the property was taken prior to the effective date of the Act.[16] There is no basis, in the statute or the legislative history,[17] for such an awkward result.

16. Petitioners' retroactivity argument applies as much to the first prong of § 1605(a)(3) as the second.

17. Although uncited by the circuit courts that have addressed the issue, there is one discussion of the retroactivity of the statute in the legislative history. The question was raised by Rep. George Danielson (who later served as a Justice of the California Court of Appeal) during the testimony of Charles N. Brower, Legal Adviser to the Department of State, and Bruno Ristau, Chief, Foreign Litigation Unit, Civil Division, Department of Justice, concerning an earlier version of the bill. *See* Respondent's Appendix A; William H. Manz, *Foreign Sovereign Immunities Act of 1976 with Amendments: A Legislative History of Pub. L. No. 94-583*, Doc. No. 14, *Immunities of Foreign States*, hearing before the Subcommittee on Claims and Governmental Relations, House Judiciary Committee, 93rd Cong. (June 7, 1973), p. 20-21 (2000). Rep. Danielson stated that "my opinion is that [the bill] could have a retroactive effect." Resp. App. A, 1a. Indeed, Rep. Danielson presciently suggested that the bill would be applied to suits concerning Nazi-looted artworks, although he requested that the text be amended to preclude this result. *Id.* at 3a. Nevertheless, the language of the bill remained essentially the same and it was never amended to bar "retroactive" application. Rep. Danielson did not raise his concerns during (Cont'd)

The United States could not have intended, when it announced the new procedures for sovereign immunity determinations, as required under *The Schooner Exchange* and *The Santissima Trinidad*, that foreign sovereigns entering the jurisdiction of United States courts would continue to be afforded sovereign immunity under standards and procedures that had been clearly repudiated by the FSIA.[18]

Petitioners first claimed immunity in this case after Mrs. Altmann filed her complaint in August 2000. Petitioners' claim to immunity was decided under the FSIA based on Petitioners' *current* activities directed toward the United States. Congress expressly directed that such claims to immunity be adjudicated under the rules and procedures set forth in the FSIA,

(Cont'd)
subcommittee discussion of the bill in the following Congress on June 2 and 4, 1976. Indeed, on September 29, 1976, Rep. Danielson himself offered the bill on the floor of the House where it passed without dissent. *Manz*, Doc. Nos. 4, 5, 9. That the retroactivity of the statute was recognizes and yet the language of the statute was not amended to preclude retroactivity demonstrates that "Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits." *Landgraf*, 511 U.S. at 272-273; *cf. St. Cyr*, 533 U.S. at 320 n.44 (inferring non-retroactivity from fact that "watchdog did not bark in the night"). By contrast, in statutes enacted in foreign countries before and after the FSIA, as the United States points out in its *amicus curiae* brief, the "enactments expressly provide that the exceptions to immunity are not retroactive. . . ." United States Brief at 19 n.14.

18. Indeed, when the FSIA was enacted, the State Department expressly advocated that United States courts should adjudicate prior acts of foreign states, such as the expropriations that followed the Cuban revolution, under principles of international law. *See Alfred Dunhill*, 425 U.S. at 711. In this sense, § 1605(a)(3) can be seen as a companion to the Second Hickenlooper Amendment, Pub. L. 89-171, 79 Stat. 653 (1964), 22 U.S.C. § 2370(e)(2), which eliminated the act of state defense for claims dating back to 1959, when the State Department did not insist on its application.

regardless of when the underlying acts took place. To hold otherwise would be to defeat the entire purpose of the statute, or to redraft it to say

> Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter, *except in cases concerning acts prior to the effective date of this legislation, in which case such claims of foreign states to immunity should be decided* . . . .

Petitioners and their *amici curiae* ask this Court to ignore the clear direction of Congress and to legislate the conclusion to this imaginary statute. A more common sense reading of the FSIA, consistent with this Court's opinion in *Dole Food*, renders such judicial legislation unnecessary.

2. Does The Expropriation Clause Of The FSIA Have An Impermissibly Retroactive Effect?

The second part of the retroactivity question can be analyzed in precisely the same way as the first, by addressing the focus of the FSIA on the present exercise of jurisdiction over the foreign state, rather than upon the prior conduct of the parties.

a. The FSIA Is A Jurisdictional Statute And Therefore Attaches No New Legal Consequences To Prior Events.

The expropriation clause of the FSIA operates here in exactly the fashion deemed non-retroactive in *Hughes*, *i.e.*, by affecting only *where* the suit may be brought, not *whether* it may be brought at all. It does not unsettle the expectations of the parties, nor does it unfairly attach new consequences to actions taking place before its enactment. [19]

19. The Court has previously considered several cases where the restrictive theory of sovereign immunity was applied retrospectively. *First Nat'l City Bank*, 462 U.S. at 619-21 (concerning Cuban (Cont'd)

Petitioners do not, and cannot, suggest that they are now, or have ever been, absolutely immune (*i.e.*, both here *and* in Austria) from Mrs. Altmann's claims. They concede that Mrs. Altmann's claims could now be brought in Austria and indeed have gone so far as to argue that Mrs. Altmann should be required to bring her claims there. Appellant's Opening Brief, dated October 19, 2001 (9th Cir.), p. 49 ("Plainly, Austria is available, adequate, and the more appropriate forum."); Appellant's Reply Brief dated November 5, 2001 (9th Cir.), p. 22 ("Austria is a more favorable forum"). Indeed, the Ninth Circuit found that Petitioners had demonstrated that Austria was an adequate and available forum for this litigation. J. App. 66a-68a. Where a United States citizen such as Mrs. Altmann seeks redress against a foreign state in our courts, a purely jurisdictional statute such as § 1605(a)(3) merely affirms jurisdiction in a domestic forum for litigation which she otherwise would have been forced to bring in the foreign state.[20] This neither unsettles the expectation, nor insults the dignity, of the foreign sovereign.[21] *See National City Bank of New York*, 348 U.S. at 363-64 ("No parochial bias is manifest in our courts which would make

(Cont'd)

expropriations in 1960-61); *Verlinden*, 461 U.S. 480 (concerning transactions in 1975); *National City Bank of New York*, 348 U.S. 356 (concerning transactions in 1920 and 1947-48).

20. There is no basis for the suggestion that a party has an "expectation" that United States jurisdictional rules governing international disputes will remain the same and that therefore a statute that confers jurisdiction in the United States unsettles the expectations of the parties that United States courts will not assert jurisdiction. If this were true, then every statute that conferred or ousted jurisdiction would raise retroactivity concerns, which is contrary to this Court's holdings in *Landgraf* and *Hughes*.

21. This is not an argument about waiver of immunity, but rather an argument about retroactivity and the settled expectations of the parties. Retroactivity does not turn on narrow expectations of jurisdictional immunity within a particular forum.

it an affront to the 'power and dignity' of the Republic of China for us to subject it to counterclaims in our courts when it entertains affirmative suits in its own.").

The expropriation clause of the FSIA attaches no "new legal consequences" to the events at issue in this case and alters not one element of any cause of action brought by Mrs. Altmann. The most Petitioners can argue is that the FSIA allows Mrs. Altmann to proceed in the United States, when she might otherwise have been required to proceed in Austria. But this is an argument obviously limited to the question of *where* the case may be brought, not *whether* it may be brought at all. *Hughes,* 520 U.S. at 951. Petitioners have failed to demonstrate an impermissible retroactive effect from the exercise of jurisdiction in this case.

b. The FSIA provides fair notice to sovereign states of their potential liability for withholding property taken in violation of international law.

As explained above, sovereign immunity has always been premised on an implied waiver of United States sovereignty for foreign states coming within the jurisdiction of our courts. From the very beginning, it was held that this implied waiver could be revoked by an express statute. *The Schooner Exchange,*11 U.S. at 146; *The Santissima Trinidad,* 20 U.S. at 353. The FSIA is on its face such a statute. When it was enacted, it provided undeniably clear notice to all foreign states that "henceforth" their claims to immunity would be adjudicated under the terms of the statute, and not under the prior regime of deference to State Department suggestions under a common law standard. 28 U.S.C. § 1602. There is no evidence that at the time of the enactment of the FSIA the United States or any foreign state understood the Act to preserve any common law claims to sovereign immunity for causes of action concerning events that pre-dated its effective date.

Thus, with the enactment of the FSIA, every foreign state was on notice that the United States would not afford sovereign immunity where rights in property taken in violation of international law are at issue. From that point, every foreign state knew that if it sent expropriated property into the United States, or entrusted it to an agency engaged in a commercial activity in the United States, its rights to ownership of that property could be adjudicated by a United States court under § 1605(a)(3).

This suit was brought twenty-three years after the effective date of the FSIA based on jurisdictional contacts by Petitioners occurring in the year 2000. Specifically, Mrs. Altmann alleged, and the Ninth Circuit found, that the paintings at issue were owned or operated by the Austrian Gallery, an agency or instrumentality of the Republic of Austria that was engaged in a commercial activity in the United States, *e.g.* advertising exhibitions and selling books featuring the looted paintings at issue. Petitioners do not claim that they were unaware of the terms of the FSIA, or that they did not receive fair notice of its provisions, when they engaged in the recent activities which formed the basis for the jurisdictional contacts found to exist by the lower courts in this case. Applying a twenty-three-year-old statute to determine jurisdiction in no way violates Petitioners' expectation of fair notice. That notice was given in 1976.

c. Petitioners did not rely on immunity.

Petitioners could never have relied on immunity from Mrs. Altmann's claims — not at the time of the initial expropriations and certainly not now. Austria was an occupied country during World War II. Immediately after its liberation by the Allies, Austria began enacting legislation designed to permit claims by persons whose property had been confiscated under the discriminatory laws imposed by the Nazis. The first three of the new laws allowed claims against the Republic of Austria for property such as the paintings at issue in this case.

Therefore, Petitioners never had any basis for believing they would be immune from the claims asserted by Mrs. Altmann for recovery of her uncle's paintings. Indeed, as the Ninth Circuit noted, liability in civil actions for such claims is anticipated under the Hague Convention of 1907, as well as under the Austrian State Treaty of 1955. The London Declarations and Moscow Declarations also warned Petitioners of their obligation to return looted artworks.

Further, there is simply no evidence that Petitioners ever relied on immunity in this case. Petitioners presented no evidence that they relied on sovereign immunity in the United States when they undertook the relevant jurisdictional acts (advertising exhibitions and selling books and tickets). They cannot point to any statement by the United States government that led them to believe in the year 2000 that the FSIA did not apply to new claims concerning World War II era expropriations. Indeed, after Mrs. Altmann filed suit in August 2000, Austria and the United States negotiated a settlement of various such claims asserted in class actions, but *expressly exempted and preserved* claims for looted artworks from the "legal closure" provision of the resulting executive agreement. Opp. App. A, 3a. *At no time* during the negotiation of the executive agreement, in which Mrs. Altmann's counsel participated, did the United States indicate to Austria that it was immune for claims concerning looted artworks. Indeed, at the insistence of Mrs. Altmann's counsel, the United States requested and obtained a letter from Austria's Ambassador confirming that Mrs. Altmann's pending case would not be affected by the agreement. J. App. L, 243a. Austria referred to Mrs. Altmann's pending case as "a matter of art restitution under the Austrian law." *Id.* There is and was simply no evidence that Austria was relying on any representation of immunity at that time.

d. Petitioners had no settled expectation of immunity.

There can be no recognizable *expectation* of immunity for acts that violate long-standing, pre-existing obligations. In *Alabama*, 362 U.S. 602, a new statute authorizing voting rights claims against a State under the Fifteenth Amendment was applied to permit suits based on acts predating the enactment, even though there was no express statement supporting retroactivity in the new law. The State was not permitted to argue that it had a settled expectation of immunity based on the prior law because the new law merely conferred jurisdiction over claims that were already authorized by the Fifteenth Amendment when the underlying acts took place. The FSIA operates in precisely the same way in this case.

Mrs. Altmann's claims are based on Petitioners' unlawful withholding of looted artworks, in violation of the Hague Convention of 1907, the Austrian State Treaty of 1955 and various Austrian restitution laws prohibiting such acts. Petitioners never could have had any expectation of immunity from suit for those illegal acts. Like the Civil Rights Act of 1960, the FSIA merely confers jurisdiction in federal court for claims that already existed and were supported under prior law.

This essential fact distinguishes the Court's holding in *Hughes*. In that case, the *qui tam* relator had no claim at all against the defendant until after the statute was amended. The new statute essentially created a claim for the relator to bring based on events that occurred prior to the enactment. By contrast, the FSIA does not create Mrs. Altmann's claim against Petitioners. The potential for her claims existed (inchoately, because she was unaware of them[22]) long before the FSIA was

22. The claims accrued only in 1999 when Mrs. Altmann first learned that she and her family's attorney had been deceived by the post-War Austrian government. Cal. Code Civ. P. § 338(d) (cause of action on the grounds of fraud or mistake does not accrue until the (Cont'd)

enacted.[23] To paraphrase *Bruner v. United States*, 343 U.S. 112 (1952), a case concerning a statute that removed jurisdiction over a claim, "Congress has not altered the nature of [Mrs. Altmann's] rights or [Austria's] liability but has simply [increased] the number of tribunals authorized to hear and determine such rights and liabilities."[24] *Bruner* at 117.

Petitioners' argument is also premised on the theory that the FSIA materially altered the law of sovereign immunity in suits over expropriated property. As demonstrated above, that argument is historically unsound.

First, Petitioners, without explanation, completely ignore the holding of Justice Story in *The Santissima Trinidad*, a case in which the Court permitted a suit against a foreign state concerning prize property on a seized ship. The artworks at issue

---

(Cont'd)
discovery of the facts constituting the fraud or mistake). The statute of limitations for actions such as this one runs from the discovery of the fraud committed on the plaintiff. Cal. Code Civ. P. § 338(d); *see Strasberg v. Odyssey Group, Inc.*, 51 Cal.App.4th 906, 915-18, 59 Cal.Rtpr.2d 474 (1996) (statute of limitations in action for conversion was tolled until fraud was discovered). Austria apparently has a similar rule. J. App. M, 245a.

23. The sole exception to this is Mrs. Altmann's claim for return of the painting *Amalie Zuckerkandl*. That painting was not donated to the Austrian Gallery until 1988 (and not delivered until the death of Vita Künstler in 2001). The application of the FSIA to this particular claim against Respondents, which did not even exist until 1988 at the earliest, cannot possibly be considered "retroactive."

24. Prof. Lowenfeld, in his *amicus curiae* brief for Societé Nationale des Chemins de Fer Français, argues essentially in favor of Mrs. Altmann's position on the retroactivity question, but then, as a hedge, suggests that the Court might make a distinction between jurisdiction-ousting and jurisdiction-conferring statutes. SNCF, p. 7. There is no legal basis for this distinction, which would require the Court to overrule *Andrus* and *Alabama* and disregard all of the Court's prior statements confirming the permissibility of applying statutes that confer jurisdiction to all pending cases.

in this case are certainly more similar to that prize cargo than to a ship of war and its armaments (over which Justice Story would have accepted an immunity claim). Were the paintings in this country, and the case brought under the first prong of § 1605(a)(3), one would be hard-pressed to distinguish Justice Story's opinion from the facts of this case. The same result should hold for a case brought under the second prong of § 1605(a)(3). The Ninth Circuit held as much when it found there could be no expectation of immunity for Mrs. Altmann's claims.

Second, Petitioners ignore the fact that the doctrine of sovereign immunity is a common law doctrine. Therefore, more recent pronouncements by the Court *ipso facto* have retroactive application.[25] *Harper*, 509 U.S. at 97-98. Petitioners have presented no evidence or argument that the FSIA differs from the common law of sovereign immunity *as it was understood in 1976 or as it is understood today*. Prior to the FSIA, this Court's most recent pronouncement on sovereign immunity was *Alfred Dunhill*, in which a plurality of four justices led by Justice White held, relying on the restrictive doctrine of sovereign immunity, that the act of state doctrine would not bar a United States court from adjudicating an offset claim against the Republic of Cuba concerning commercial property expropriated by the Cuban government in 1960.[26] As Justice White explained:

> It cannot be gainsaid, however, that the proper application of each [of the act of state and sovereign

---

25. An act of Congress supersedes an earlier rule of international law if that is the clear purpose of the statute. *The Paqueta Habana*, 175 U.S. 677, 700 (1900); *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1813) (Marshall, C.J.); Restatement of Foreign Relations Law (Third), § 115(1)(a) (1989).

26. The act of state doctrine itself only applies in the absence of a treaty upon which to judge the acts of the foreign state. *Banco National de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964).
(Cont'd)

> immunity doctrines] involves a balancing of the injury to our foreign policy, the conduct of which is committed primarily to the Executive Branch, through judicial affronts to sovereign powers . . . against the injury to the private party, who is denied justice through judicial deference to a raw assertion of sovereignty, and a consequent injury to international trade. The State Department has concluded that in the commercial area the need for merchants "to have their rights determined in courts" outweighs any injury to foreign policy. This conclusion was reached in the context of the jurisdictional problem of sovereign immunity. We reach the same one in the choice-of-law context of the act of state doctrine.

Alfred Dunhill, 425 U.S. at 706 n.18. Justice Powell, concurring with the plurality opinion of Justice White, took an even more expansive approach, stating, as he had in *First Nat. City Bank*, that "Unless it appears that an exercise of jurisdiction would interfere with delicate foreign relations conducted by the political branches, I conclude that federal courts have an obligation to

---

(Cont'd)

The concern in *Sabbatino* was that it would be unwise for courts to judge the acts of countries where there is not even a basic agreement on the fundamental principles of law to be applied. When there is a treaty governing the act, and no dispute over the applicable law, this rationale for abstention under the act of state doctrine evaporates. Petitioners withdrew from their motion to dismiss any assertion of the act of state defense, and therefore this defense has not been litigated in this case. In any event, under *Sabbatino*, the defense could hardly succeed here, since the claims at issue are clearly covered by the Austrian State Treaty of 1955 and the Hague Convention of 1907, and therefore there would be no grounds for the court to decline to hear the case under the act of state doctrine. Also militating strongly against an act of state defense is the State Department's pronouncement in *Bernstein*, repeated in its statement in *Alfred Dunhill*, that the act of state doctrine need not apply to cases involving Nazi confiscations. *Alfred Dunhill*, 425 U.S. at 708.

hear cases such as this." *Alfred Dunhill*, 425 U.S. at 775-776 (Powell, J., concurring).

Therefore, the federal common law of sovereign immunity in 1976, prior to the enactment of the FSIA, permitted suits against foreign states concerning private, commercial property taken in violation of international law. *See also Alfred Dunhill*, 425 U.S. at 710 n.2 (November 26, 1975 letter of Monroe Leigh, Legal Adviser to State Department, identifying foreign law decisions rejecting sovereign immunity and act of state defenses in cases concerning expropriated property). As a statement of the common law, this rule applied to all suits no matter when the underlying acts took place. And as Justice White noted, citing Chief Justice Marshall's opinion in *Planter's Bank of Georgia*, "[d]istinguishing between the public and governmental acts of sovereign states on the one hand and their private and commercial acts on the other is not a novel approach." *Alfred Dunhill*, 425 U.S. at 685. Therefore, the suggestion that the FSIA altered the law or is impermissibly retroactive when applied to claims relating to underlying events predating its enactment (or the Tate Letter of 1952) is simply unfounded. The FSIA merely codified the existing state of the common law; its application to claims concerning underlying facts prior to its effective date has no impermissibly retroactive effect.

Indeed, as noted in the *Alfred Dunhill*, Austria itself long ago abandoned the notion of absolute immunity. *Alfred Dunhill*, 425 U.S. at 702 n.15, citing *Collission with Foreign Government-Owned Motor Car (Austria) Case*, 40 Int'l L. Rep. 73 (Sup. Ct. of Austria 1961). The history of this development is explained in the influential case of *Dralle v. Republic of Czechoslovakia*, 17 Int'l.L.Rep. 155 (Sup. Ct. of Austria 1950). In *Dralle* a German company filed suit in Austria against the Republic of Czechoslovakia over trademarks that had belonged to a nationalized Czech subsidiary of the German company. The Austrian Supreme Court held that the defense of sovereign

immunity could not be asserted because the case concerned the commercial activities of a foreign state and not its political activities.[27]

As it is applied in this case, § 1605(a)(3) of the FSIA is consistent with the common law approach and does not present a marked departure from the common law rule identified in *Alfred Dunhill*. This case does not concern the "public and governmental acts" of a sovereign state. Hoarding paintings that were purchased by private collectors is not an act integrally related to the functioning of a government. It is more akin to a commercial activity, and indeed it is now commonplace (both in the United States and in Austria) for private individuals and foundations to operate museums. This case has no bearing on the essential functions of the Austrian government; it will not interfere with the government's exercise of military or police functions, its regulation of industry, or the collection of taxes. This case concerns privately collected paintings hanging on a private citizen's wall — specifically, paintings which until 1938 hung on the wall of Mrs. Altmann's uncle's home in Vienna and which have been withheld from his niece and heir in violation of principles of international law set forth in treaties dating back almost one hundred years. Under the common law of sovereign immunity as it is understood today, Mrs. Altmann's claims would be allowed to proceed.

---

27. Indeed, Austria's leading commentator on public international law issues of sovereign immunity and confiscation, Ignaz Seidl-Hohenveldern, opined in 1962 that although public international law does not necessarily command the recognition of claims for expropriated property, *it also does not forbid them, and the weightier arguments of the public order speak in favor of the recognition of such claims*. Seidl-Hohenveldern, 56 American Journal of Int'l L. 509 (1962) ("The writer has stated more than once, that he very strongly rejects the view that a state would violate international law if its courts permitted an owner to recover an object of which he had been dispossessed by an act of state of the situs of the property.").

B. No Foreign Policy Interests Are Actually At Stake In This Litigation.

Mrs. Altmann's case raises absolutely no substantial foreign policy issues. In contrast to probably all other World War II-era cases being litigated at this time, the United States has *not* filed a statement of interest in this case because this case does not, by itself, implicate any foreign policy objectives of the United States. To the contrary, Mrs. Altmann's position here is consistent with the United States' true position that Nazi-looted artworks should be returned to their original owners. *See United States v. Portrait of Wally*, 2002 U.S. Dist Lexis 6445 (action brought by United States to forfeit Nazi-looted painting on loan from a publicly funded and government-controlled Austrian museum); Opp. App. D — Holocaust Victims Redress Act, Pub. L. No. 105-158, 112 Stat. 18 (1998).[28] Nor does this case conflict with any existing executive agreement or treaty between the United States and Austria. *See Multilateral Austrian State Treaty*, TIAS 3298; 6 U.S.T. 2369; 1955 U.S.T. Lexis 35 (May 15, 1955); Opp. App. C — Austrian State Treaty of 1955, Article 26.

Because the FSIA arguably precludes them from doing so, the State Department long ago stopped issuing suggestions of immunity on behalf of foreign states, and it has not issued one here. *See* 75 Dept. of State Bull. 649 (1976) ("The Department of State will not make any sovereign immunity determinations after the effective date of [the FSIA]. Indeed, it would be inconsistent with the legislative intent of that Act for the Executive Branch to file any suggestion of immunity on or after

---

28. *See also* Stuart Eizenstat, *In Support of Principles on Nazi-Confiscated Art*, December 3, 1998, at http://www.state.gov/www/policy_remarks/1998/981203_eizenstat_heac_art.html; "Plunder and Restitution: Findings and Recommendations of the Presidential Advisory Commission on Holocaust Assets in the United States and Staff Report," December 2000, at http://www.pcha.gov/PlunderRestitution.html/html/Home_Contents.html; Washington Conference on Holocaust-Era Assets (1988), http://fcit.coedu.usf.edu/holocaust/resource/assets/heac2.pdf.

January 19, 1977."). Consistent with this approach, during the negotiation of the recent executive agreement, the United States informed Austria that it would not file a statement of interest in this case. J. App. L, 243a. Therefore, the United States has not taken the position that this lawsuit will interfere with the foreign policy objectives of the Executive Branch.

The degree of deference normally accorded to the views of the United States in cases involving foreign governments should not be afforded here. The United States' role as *amicus curiae* merely reflects the government's views as to statutory construction of the FSIA. The United States has not made any stronger suggestion that this particular case interferes with the foreign policy of the United States, as it has in other cases. Rather, its concern is for these other, unrelated cases, which it fears might be permitted to proceed if Mrs. Altmann's jurisdictional position is affirmed.

The United States concludes, without any evidence or even an attempt at justification, that the jurisdiction ruling of the Ninth Circuit "may have serious consequences for the United States' conduct of its foreign relations, including reciprocal treatment of the United States in foreign courts."[29] The United States apparently believes that this vague pronouncement is sufficient to outweigh Mrs. Altmann's rights to have her case heard on the merits under the FSIA.

What exactly are the "serious consequences" that the United States fears from this case? It is disingenuous for the Petitioners

29. Underscoring the wisdom of the FSIA in excluding the Executive Branch from these types of determinations, it should be noted that the State Department came to the exactly opposite conclusion in the *Alfred Dunhill* case. *Alfred Dunhill*, 425 U.S. at 711 (quoting letter of Monroe Leigh, Legal Adviser to the State Department to the Solicitor General, dated November 26, 1975, which concluded "In general this Department's experience provides little support for a presumption that adjudication of acts of foreign states in accordance with relevant principles of international law would embarrass the conduct of foreign policy.").

and their *amici* to argue that this case will "open the floodgates" of litigation against other states over acts that occurred during World War II. The several pending cases mentioned raise a host of other, potentially dispositive, issues not present here.[30] The defendants in those cases,[31] supported by statements of interest filed by the United States, have raised numerous defenses, not the least of which is the purported interference by those actions with various executive agreements and treaties, an argument that cannot be made in this case. Notably, this Court's decision in *Am. Ins. Ass'n v. Garamendi*, __ U.S. __, 156 L. Ed. 2d 376, 2003 U.S. LEXIS 4797 (June 23, 2003), has no bearing on this case because the United States and Austria have agreed that Mrs. Altmann's claims do not affect any executive agreement or treaty. J. App. L, 243a; *see also* footnote 7, *supra*. There has never been any attempt to reach a diplomatic settlement of individual looted art claims, and indeed such claims were expressly preserved in the recent executive agreement.[32] Opp. App. A, 2a-3a.

This case presents a complex combination of somewhat unique facts and legal issues that is *sui generis* and not likely to be repeated in other cases. Mrs. Altmann should not be required to argue against unknown results in quite different actions. Indeed, on April 15, 2003, Judge Florence Marie Cooper (the same district court judge who affirmed jurisdiction in this case)

30. It appears that most of the pending class actions (for example the ones asserted against Japan and Mexico) allege jurisdiction under the commercial activity exception, § 1605(a)(2), rather than under § 1605(a)(3)).

31. Most of the cases also concern non-sovereign defendants, so that issues involved there will likely be litigated regardless of the success or failure of the sovereign immunity defense.

32. The express exclusion and preservation of individual claims for looted artworks from the recent executive agreement, made with knowledge of Mrs. Altmann's then-pending action, precludes any assertion that the United States has reserved its interest in exercising diplomatic efforts to settle these particular claims.

dismissed a class action suit asserting World War II-era commercial activity and expropriation claims against Austria on the grounds of the executive's foreign policy power under the political question doctrine. *Anderman v. Federal Republic of Austria*, 256 F. Supp. 2d 1098 (C.D.Cal. April 15, 2003). Judge Cooper's rationale was identical to this Court's reasoning in *Garamendi*: that in the face of a statement of interest by the United States Government asserting that the maintenance of a class action would interfere with an executive agreement between the United States and Austria, the Court could only conclude that the suit would impermissibly interfere with the foreign relations power of the executive branch. *Id.* It therefore appears highly unlikely that the hypothetical results feared by Petitioners and their *amici* will occur. *See also Roeder v. Islamic Republic of Iran*, 333 F.3d 228 (D.C. Cir. 2003) (executive agreement preempts claims against Iran); *Deutsch v. Turner Corp.*, 317 F.3d 1005, *rehearing denied and opinion amended* 324 F.3d 692 (9th Cir. 2003) (executive agreements and treaties bar various World War II claims); *Cruz v. United States*, 2003 U.S. Dist. LEXIS 10948 (N.D.Cal. 2003) (denying reconsideration of ruling dismissing a class action lawsuit against Mexico on sovereign immunity grounds); *Duveen v. United States Dist. Ct (In re Austrian and German Holocaust Litig.)*, 250 F.3d 156 (2d Cir. 2001) (compelling dismissal of class action against German banks on comity grounds); *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248 (D.N.J. 1999) (dismissing slave labor claims against Germany); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424 (D.N.J. 1999) (same).

In sum, the parade of alleged horribles suggested by Petitioners and their *amici curiae* has not, and will not, come to pass. Mrs. Altmann's claims are unique, and the legal holding here will not control cases where other issues are before the judiciary and other defenses are available.

CONCLUSION

For all the foregoing reasons, Mrs. Altmann respectfully requests that this Court find that the FSIA does not operate retroactively, and that in particular it has no impermissibly retroactive effect on the rights and remedies of the parties to this action. The Court should therefore affirm jurisdiction in this case. This is the only result that will allow Mrs. Altmann to proceed with her claims on their merits so that they can be resolved during her lifetime.

Respectfully submitted,

E. RANDOL SCHOENBERG
Counsel of Record
DONALD S. BURRIS
BURRIS & SCHOENBERG, LLP
12121 Wilshire Boulevard, Suite 800
Los Angeles, CA 90025
(310) 442-5559

Attorneys for Respondent

APPENDIX

Hearing before the Subcommittee on Claims and Governmental Relations, House Judiciary Committee, 93rd Cong. (June 7, 1973) on H.R. 3493. Testimony of Charles N. Brower, Acting Legal Adviser, Department of State and Bruno Ristau, Foreign Litigation Unit, Civil Division, Department of Justice

MR. DANIELSON. This exception here on nationalized or expropriated property gives rise to a host of implications. This bill, as I understand it, would be to recognize the right of our courts to have jurisdiction over a foreign state under certain circumstances; therefore, it is procedural in nature, rather than substantive in nature, and my opinion is that it could have a retroactive effect. It would simply allow the litigant to come into court, which he is presently barred from doing.

Let's take the, oh, the Baltic States: Lithuania, Latvia, Estonia, within which many properties were expropriated and nationalized way back at the time of World War II. Your language here says: "Any property exchanged for such property," so let's assume that a person who was a national of Lithuania, and who had property in Lithuania was expropriated and nationalized by the powers which took over Lithuania in 1939 or 1940 or 1941 — whenever it was and these properties have now been exchanged for some properties which are here. Would the former Lithuania be able to bring an action in our American courts against the Soviet Union — I presume it would be — for the properties which are now resident here in the United States?

MR. RISTAU. Congressman, the important question is, the entity which presently has custody over the property, is it engaged in trade with that property in the United States? In other words, are they trading?

MR. DANIELSON. This ties back to the commercial nature?

MR. RISTAU. Are they engaged in commerce in the United States with respect to that particular property? Yes.

MR. BROWER. Under the statute either of several things need to apply, and you mentioned one; that it has to be present in the United States in connection with a commercial activity carried on in the United States by the foreign state and that means —

MR. DANIELSON. Wait. How about a ship, a steamship, for example, which is now in New York Harbor with a cargo of something?

MR. BROWER. I think your question illustrates the complexities of this area of the law, because you are now getting into the maritime area.

MR. DANIELSON. Well, it brought over a cargo of railroad cars for instance, and those railroad cars are now present in New Jersey. That is no longer maritime, the cargo is now on land.

MR. BROWER. Okay.

MR. DANIELSON. I am going to make a suggestion. I think if we are going to have a law like this, we better provide that it is not retroactive, because this could open up a can of worms that you will never be able to close.

MR. BROWER. Well, I think that is a problem. You are right. I think that certainly in many cases, the passage of a period of time as long as 30 years or more could certainly raise questions as to whether the property present in a country, was, in fact, transferred or exchanged.

MR. DANIELSON. What about a work of art? It may exist hundreds of years. Hitler confiscated and nationalized unknown quantities of valuable artwork and some of them have shown up elsewhere. I mean, this is not just imagination, you know; it is real.

MR. BROWER. No; I understand that. I think that is a real point because if, as we intend, one of the principal objects of the statute is to avoid undue foreign relations problems, then we want to be sure it is so drafted as to not raise new foreign relations problems. You put your finger on that one that I think is particularly noteworthy. It is a concept, perhaps, behind the statute of limitations as well.

MR. DANIELSON. I think most of our courts provide, however, that where a statute of limitations is tolled, where the proposed litigant is barred from asserting his remedy, due to a procedural problem —

MR. BROWER. I see your point. I think we should explore it.

MR. DANIELSON. I think we should simply provide that it not be retroactive and solve the whole problem.

MR. BROWER. I think that is very true since the effect of a statute in this particular case is, in fact, not only procedural but substantive to some extent. I think we do need to be particularly careful on how it is drafted.